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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1948.

No. 543.

EDGAR J. SCHOEN,

Petitioner,

v.

MOUNTAIN PRODUCERS CORPORATION, a Delaware Corporation, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF RESPONDENTS, ARTHUR E. JOHNSON, D. R. MURPHY AND HAROLD D. HERNDON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 170 F. (2d) 707. The opinion of the United States District Court for the District of Delaware is reported in 76 Fed. Supp. 554.

JURISDICTION.

Jurisdiction of this Court is invoked under Revised Title 28 U. S. C. Sec. 1254 (1). The judgment of the Circuit Court of Appeals was entered November 9, 1948, and an order staying the mandate pending petitioner's application for a writ of certiorari was entered January 7, 1949.

STATEMENT OF THE CASE.

Petitioner, Edgar J. Schoen, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in so far as it affirms the District Court's dismissal of the complaint as to respondents, Arthur E. Johnson, D. R. Murphy and Harold D. Herndon.

On May 26, 1947, Schoen, a stockholder of Mountain Producers Corporation (a Delaware corporation), brought this derivative suit on behalf of Mountain Producers in the United States District Court for the District of Delaware, naming as defendants, Mountain Producers Corporation, Standard Oil Company (Indiana), Stanolind Oil & Gas Company, Saltmount Oil Company, Argo Oil Corporation, G. E. Griffith, W. J. Geddes, T. A. Dines, D. R. Murphy, Arthur E. Johnson, T. C. Tonkin and Harold D. Herndon (R. 8-13).

Jurisdiction in the District Court is based solely upon diversity of citizenship (R. 24). The plaintiff, Schoen, is a resident and citizen of Illinois (R. 8).

Defendants, Mountain Producers, Stanolind, Saltmount and Argo are all Delaware corporations and were served with process in Delaware (R. 3 and 8).

Defendants, Johnson and Murphy, citizens and residents of Colorado, and Herndon, a citizen and resident of Texas, were also served in Delaware (R. 3 and 8).

The remaining named defendants (Standard, Griffith, Geddes, Dines and Tonkin), are all residents and citizens of States other than Delaware. They were not served with process and have not appeared in this cause (R. 3 and 8).

On March 6, 1948 the District Court entered a judgment dismissing the complaint as to all the defendants on the ground that venue was improperly laid (R. 18-21) 76 Fed Supp. 554. On appeal, the Circuit Court of Appeals, likewise finding that venue was improper as to Johnson, Murphy and Herndon, affirmed the dismissal of the complaint as to them but reversed that part of the judgment of the District Court which dismissed the complaint as to the Delaware corporations (R. 207-219). 170 F. (2d) 707.

ARGUMENT.

I.

The Circuit Court of Appeals Correctly Decided That Venue Was Improper as to Respondents, Johnson, Murphy and Herndon.

Despite petitioner's elaborate and confusing representations to the contrary, the question presented is simple: Was the District of Delaware an appropriate district in which to bring this stockholder's derivative suit in view of the venue statutes in force prior to September 1, 1948?

At the time this suit was commenced (May 26, 1947), and at the time judgment was rendered in the District Court (March 8, 1948), whether or not venue was proper necessarily had to be determined by the applicable Federal venue statute then in force. That statute was Section 51 of the Judicial Code of 1911, as amended by Act of April 16, 1936, 49 Stat. 1213, which read as follows:[1]

> "Except as provided in sections 113-117 of this title, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in sections 113-118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; *except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been*

[1] Prior to 1936 the general venue statute consisted of the non-italicized language. The italicized portion represents the 1936 amendment.

brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found." (Italics supplied.)

A. The Language of Former Section 51 of the Judicial Code Is Not Susceptible of the Meaning Petitioner Seeks to Place Thereon.

The court below found the language of the statute clear and unambiguous (R. 210). The non-italicized provisions permitted diversity suits to be brought either in the district where the plaintiff resided or in the district where the defendant resided and in those instances where there were more than one defendant, the latter meant the district in which all the defendants resided. *Camp v. Gress,* 250 U. S. 308 (1919). Obviously, the non-italicized provisions did not, as to Johnson, Murphy or Herndon, support the venue laid in the present case, for the District of Delaware was neither the district where plaintiff resided (Illinois), nor where the defendants, Johnson, Murphy (Colorado), and Herndon (Texas) resided.

The above quoted italicized provisions stated, in effect, that a stockholder could bring a derivative suit on behalf of an injured corporation in any district in which suit against the other defendants "might have been brought by said corporation". This language simply provided a rule for testing venue in derivative suits and, applied to this case, meant that unless Mountain Producers (a Delaware corporation) could maintain in the Federal District Court of Delaware a suit against Johnson, Murphy and Herndon (citizens and residents of Colorado and Texas) and other Delaware Corporations (Argo, Saltmount and Stanolind), venue was improper. That venue was improper under such circumstances is clear. Such a suit could not have been maintained because of the absence of complete diversity between plaintiff and all the defendants. As Judge Maris stated (R. 210-211):

"Whether a corporation may bring a suit in a given district certainly depends just as much upon whether the district court of that district would have jurisdiction of the subject matter as upon whether the district is one in which the venue statute authorizes suit to be brought. If no federal district court in any district would be empowered to entertain the suit, it is idle to talk of a particular district in which suit might be brought. Moreover, under the statutory language, we are compelled in any event to consider the question of jurisdiction before we can ascertain the proper venue. . . . It is true, of course, that this construction of the statute imports a jurisdictional element into a statute relating to venue but there is nothing to prevent Congress from drawing a venue statute in such terms and we think that in this instance it did so."

The decision of the court below is in accord with the well defined intention of Congress to limit rather than to expand the venue in civil actions. If hardship results to the petitioner, it comes by reason of his own selection, for he could have joined all of the defendants in this action in the State court in Delaware and, there, could have served them with process as effectively as in the Federal Court.

We submit that the Circuit Court's action in affirming the dismissal of the complaint as to the non-resident defendants, Johnson, Murphy and Herndon, was without error.

B. The Enactment of the Revised Judicial Code Repealing Old Section 51 Robs the Question of All Public Importance.

The Circuit Court's construction of the now repealed Section 51 of the Judicial Code, which was the crucial point before the court below, is now devoid of public interest and importance. The broadened and greatly clarified statements of rules regarding venue, derivative stockholder actions, and service of process, now found in Secs. 1391, 1401

and 1695 of Revised Title 28 U. S. C. are not helped by construction by this Court of the repealed Section 51. The amendments have, we believe, clarified the rules formerly embodied in the provisos and exceptions to old Section 51. If the new statutes require amplification by construction, and we submit they do not, it should be supplied directly on a record squarely presenting such an issue and not obliquely in the present case which is controlled by the now repealed Section 51 of the Judicial Code. Either the amendments clarify the meaning of the former statute, or they close a chapter on procedural matters and make determination of the matter here presented of limited, if of any, importance.

C. Section 1406 (a) of the Revised Judicial Code Has No Retroactive Effect and Is Inapplicable.

Petitioner's final argument is that if venue in Delaware as to these three respondents was improper, yet the Circuit Court should have applied Section 1406 (a) of Revised Title 28 U. S. Code, which became effective subsequent to the entry of the judgment appealed from and the Court's failure so to do was error. That section of the Code provides:

> "(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought."

The petitioner cites a number of cases in an attempt to show that these three individual respondents have no vested interest in *venue*. Those cases are not in point either in principle or fact. The petitioner, of necessity, ignores the fact that these respondents obtained a judgment of dismissal under the then controlling statute. Certainly the dismissal order of the District Court was proper when entered, at least as to these defendants. The dismissal of the complaint as to them was a final and conclusive judgment in which they have a substantive right if it was as to them

free from error. The petitioner himself has pointed out that in one of the causes of action, the ninth, these three individuals were the only defendants ever served. The circumstance that in other causes of action, embodied in the same complaint, errors as to venue over other defendants kept an appeal alive in the Circuit Court should not affect the rights of these respondents who had rightly been dismissed from all of the causes of action.

The point is forcefully made by Judge Maris (who was a member of the Advisory Committee appointed by this Court to collaborate with the Congressional Committee to carry forward the revisions in the Judicial Code), when, speaking for the Court below in the instant case, he said:

> "That section [1406 (a)] was not in force on March 6, 1948, however, when the judgment here under review was entered. On that date the non-resident defendants were entitled, under the law as it then stood, to the dismissal of the complaint as to them. Moreover, the court then had no power to transfer the case even if it had been asked to do so. On this appeal, however, we are called upon to determine only whether the district court erred, at the time it acted, in dismissing the complaint as to these defendants. For us now to apply this subsequently enacted provision of Section 1406 (a) would involve the retroactive annulment of a judgment validly entered by the district court. This the statute did not and could not do." [Words added.]

A contrary ruling by the Circuit Court or by this Court would involve the retroactive annulment of many judgments of dismissal for improper venue heretofore entered by the Federal District Courts throughout the country.

The petitioner's argument based upon Section 1406 (a) is without merit. That section permits transfer of a case to a "district or division in which it could have been brought". Obviously, there is no district in which all the defendants reside. Even the most ingenious analysis of

multiple residence concepts indulged in by the petitioner cannot tie Herndon, a Texas resident, Johnson and Murphy, Colorado residents, into residents of a single district. Hence, transfer could be *considered only* with reference to the Northern District of Illinois, where plaintiff resides.

Could this action have been brought in the Northern District of Illinois? The answer is no, for if it had been brought there originally, service upon each of these three individual respondents could not in regular course have been obtained, since Illinois is not a state in which any of them resides. To have served any of them there would have been merely fortuitous, if not impossible. We submit, then, that Section 1406 (a) is not satisfied when impossible problems in service of process are developed by attempts to apply it. Moreover, even if such a transfer were ordered under Section 1406 (a), these respondents would have to be given the opportunity to move to quash the process served in Delaware for illegality of place of service. As to the illegality of service in this connection Section 1693 of the Revised Judicial Code is of the utmost significance. It provides:

> "Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court."

This statute, by its very language, would entitle the three individual respondents to quash the service of process if the instant litigation were transferred to the Northern District of Illinois.

Not enough time has passed for judicial construction of Section 1406 (a) of the Code. We predict, however, that it will not finally be interpreted as a means by which all geographical restriction upon service of process can be avoided by the simple expedient of making deliberate choice of a wrongful venue and then hoping the action will bounce back into the plaintiff's home district, with otherwise unattainable service of process attached. Before the ramifications of that sort of practice are clarified by a ruling

of this Court, records built up by timely motions restricting transfer or to quash service made during the interval of wrongful venue must be presented and ruled upon by the trial courts. The procedure of certiorari addressed to a record made *before* the amendments were enacted is ill adapted to permanent clarification of such a point.

II.

The Circuit Court's Decision Is Not in Conflict With Decisions of This Court or Other Circuit Courts.

As bearing upon petitioner's further suggestions (Petition, pp. 8-10) that the decision below is in conflict with decisions of this Court as well as decisions in other Circuit Courts, it is to be noted that, in the opinion below, the Court said (R. 215):

> "The question is one of first impression in the courts of appeals."

Moreover, Judge Maris quoted from *King v. Wall & Beaver Corp.*, 145 F. (2d) 377 (C. A. D. C., 1944) in support of the Court's decision. As to the conflict with cases of this Court, it need only be pointed out that the Circuit Court largely depended upon the law as announced by this Court to reach its decision. (See cases cited in footnotes to opinion—R. pp. 215-217.) As to the applicability of Section 1406 (a), petitioner cites certain decisions of this Court purporting to be at variance with the lower court's decision in this case. (Petition, p. 10.) An analysis of those decisions, however, indicates that petitioner ignores the fact that those cases dealt with what the Court regarded as matters of great national concern rather than with individual rights, a distinction which was made in *United States v. Schooner Peggy*, 1 Cranch. 103, 110 (1801), and which has since been continuously recognized by this Court.

By no stretch of the imagination can the case of *Brotherhood of Locomotive Firemen v. Graham, et al.*, as yet unreported (R. pp. 229-239), relied upon so heavily by

petitioner, be construed as in conflict with the opinion below in this case, because of its obvious factual difference. In that case the motion to dismiss for improper venue had been denied by the District Court; hence no dismissal had as yet occurred when the case reached the Appellate Court. Pending the appeal Section 1406 (a) became effective. Manifestly, there was no vested or substantive right in the District Court's order denying a motion to dismiss.

CONCLUSION.

The decision of the Circuit Court of Appeals was clearly correct upon the narrow issue presented and it is not in conflict with decisions of this Court or of other Circuit Courts. Moreover, the construction of Section 51 of the Judicial Code of 1911, as amended in 1936, is now moot and without public interest in so far as future litigation is concerned since its repeal and replacement by Sections 1391, 1401, 1695 and 1406 (a), Revised Title 28 U. S. C.

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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